Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

JOHN ROBERT PAPE and
MARC ANDREW CHANDLER,

Petitioners,

v.

THE FLORIDA BAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does it violate the First Amendment for a state to discipline attorneys who included the image of a "pit-bull" dog and the phone number 1-800-PITBULL in their advertising, when the disciplinary action was imposed without applying the *Central Hudson* commercial speech standard, and without any empirical data or other supporting evidence to justify the advertising prohibition, but was rather based solely on the grounds that such advertising is "demeaning to the profession" and "demeaning to our system of justice" and "inherently misleading?"

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John Robert Pape and Marc Andrew Chandler petition this Court for a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of Florida.

OPINIONS BELOW

On November 17, 2005, the Supreme Court of Florida rendered its opinion in *The Florida Bar v. Pape,* No. SC04-40, & No. SC04-41, App. 1., in a consolidated opinion applicable to both Petitioners.

STATEMENT OF JURISDICTION

This Petition has been filed within ninety days of the opinion below; this Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . ."

STATEMENT OF THE CASE

This is a lawyer advertising case presenting First Amendment issues that have never been addressed directly by this Court, issues that have confounded and divided bar regulators and lower courts nationwide. Distilled to its core, this case presents the question of whether lawyers may be disciplined for engaging in advertising deemed by Florida to be "demeaning to the legal profession" and "our system of justice" and correspondingly "inherently misleading," even though that advertising is not false, fraudulent, deceptive, or misleading in any palpable sense. There is a pressing need for this Court's engagement in and clarification of the First Amendment issues posed by this Petition—a need felt by the hundreds of thousands of lawyers and law firms throughout the country who advertise—the bar authorities nationwide who regulate advertizing, and state and federal courts charged with adjudicating the growing number of conflicts that arise from that advertising.

The facts here are simple. John Robert Pape and Marc Andrew Chandler are personal injury attorneys from Fort Lauderdale practicing as the firm Pape & Chandler. They have

adopted the image of a pit bull dog as an advertising device. Two images of the faces of pit bulls, each about the size of a quarter, appear on the top of their firm letterhead. The firm's toll-free telephone number uses the mnemonic 1-800-PIT-BULL. The firm's Internet address is similar: www.800pitbull.com. The pit-bull logo and pit bull phone number appear in the law firm's television advertising. For these actions *alone*, Pape and Chandler were disciplined by the Supreme Court of Florida, on the rationale that these devices "demean all lawyers and thereby harm both the legal profession and the public's trust and confidence in our system of justice," and are thus "inherently deceptive." App. 1-2.

A conflict over whether a lawyer may use the image of a pit bull to advertise might at first seem trifling. But the constitutional issues posed by a governmental ban on such advertising—a ban anchored in the amorphous and standardless judgment that such advertising is "demeaning" to the legal profession and the legal system—are not. No lawyer advertising cases from other jurisdictions appear to have involved pit bulls. The national conflict among courts and bar regulators is not over pit bulls but paternalism. The conflict may be distilled into such fundamental doctrinal divides as: (1) whether the four-part commercial speech standard articulated in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980), and its progeny does or does not apply to the regulation of lawyer advertising; (2) whether maintenance of "the dignity of the profession" is an interest sufficient in itself to justify severe restrictions on lawyer advertising; (3) whether all self-promoting and self-laudatory statements are inherently misleading and disqualified at the threshold from First Amendment protection; (4) whether the use of stock advertising devices such as logos, slogans, jingles, drama, humor, music, or appeals to emotion are inherently misleading and thus disqualified at the threshold from First Amendment protection; (5) whether bar regulators have wide latitude to label advertising "inherently misleading," and are correspondingly excused from any requirement that regulations be supported by empirical data or other objective

evidence justifying the regulation, even without considering such alternative palliatives as disclaimers or disclosure requirements.

The nationwide conflicts over these issues are in part the product of division over how to interpret the prior First Amendment lawyer advertising decisions of this Court. Those cases principally dealt with relatively straightforward questions as whether lawyers could list practice specialities, certifications, or other unvarnished factual material regarding types of legal claims handled, cost and fee arrangements, state licensures, or contact information. Many bar authorities and lower courts have taken the position that the prior decisions of this Court have set both the *minima* and the *maxima* for lawyer advertising, reasoning that no color or coloration need be tolerated, and that lawyer advertising kept sterile, factual, and stripped to bare bones. In contrast, other bar regulators and courts have argued that lawyers partake of the same First Amendment rights of other advertisers. Those decisions have demanded that state regulation of advertising comport with the rigors of the *Central Hudson* test, have evidenced deep skepticism toward regulations grounded in paternalism and protectionism, and have resisted the casual recitation of the phrase "inherently misleading" as a talisman granting carte blanche to bar authorities to constrain the content of lawyer advertising severely.

This Court's pathbreaking decisions holding that lawyer advertising is protected by the First Amendment have not been universally embraced by the profession. Many bar regulators have applied those decisions dragging and kicking, reflexively opposing any speech that pushes even modestly beyond sterile recitation of basic facts. In contrast, this Court's *Central Hudson* jurisprudence does not treat the creative entrepreneurial spirit of modern mass advertising as an evil, but as a vital engine in which the robust and open commercial marketplace and the robust and open marketplace of ideas converge. Lawyers are entitled to participate in those markets, with the same constitutional rights as others.

The Supreme Court of Florida's opinion was a vivid display of hostility toward lawyer advertising, but not an

isolated one. Many bar regulators and lower courts have similarly suggested that lawyers are not full-fledged First Amendment citizens, but aliens relegated to a regime in which ordinary commercial speech standards are diluted, adulterated, or utterly ignored. Under this approach, bar regulators deem themselves unencumbered by the First Amendment principles emanating from *Central Hudson* and its progeny. Draconian censorship of lawyer advertising is thus approved – without the proffering of any substantial government interest to buttress it beyond vague invocations of the "dignity of the profession" or "confidence in the system of justice," without empirical data to support claims that such soft advertising techniques actually cause consumers any harm, without any demonstration that the regulations at issue will directly or materially advance the government's interest, without any resort to less speech-restrictive means, such as the requirement that lawyers employ cautionary disclaimers.

This case is a perfect vehicle for this Court's intervention, an intervention that would serve the best-interests of the profession and the public. The Supreme Court of Florida *did not even cite* the *Central Hudson* test, or evince any obligation to apply it. The Court instead mechanically reviewed just four selected lawyer advertising decisions of this Court, reasoning that those decisions, establishing that minimalist "who, what, and where" lawyer advertising *was* protected by the First Amendment, at the same time drew the line, establishing that such advertising *was all* that was protected.

It is plain that the State of Florida could not ban the image of a pit bull dog in advertising by accountants, investment brokers, information technology consultants, beer producers, computer manufacturers, car dealers, or pest exterminators. Wherever an advertisers' creative imagination might lead, the First Amendment will follow. Nothing in this Court's *Central Hudson* jurisprudence suggests that the government may penalize advertisers for engaging in expression solely because it is deemed "demeaning to dignity," thereby empowering regulators to act as "taste police" authorized to sanction expression under amorphous and subjective standards that vary from case to case and state to state. Similarly, nothing in

this Court's *Central Hudson* jurisprudence suggests that speech may be banned as "misleading" under a conception of that term so malleable and elastic as to render it a mere surface euphemism. The court below, joined by other decisions from other jurisdictions, have invoked the "inherently misleading" rationale disqualify from First Amendment protection even the most tepid colorations in lawyer advertising that are mildly self-promoting or self-laudatory. Stretched far beyond the ordinary meaning of words such as "false," "misleading," "fraudulent," or "deceptive," the phrase "inherently misleading" is summoned as convenient cover for regulation that is in reality grounded not in the judgment that the expression is untrue, but in the judgment that it is undignified.

The time has come for this Court to address the conflict in the profession and the courts over the permissible reach of lawyer advertising. Our First Amendment jurisprudence is largely populated by cases vindicating the rights of speakers to engage in expression that many would find distasteful or undignified. It may well be that many American lawyers, including members of the Court, would not choose to present themselves to consumers by conjuring an association with pit bulls. But under our First Amendment principles, even when discounted by the reduced standards applicable to commercial speech, we assign the management of good taste to the forces of the marketplace, not the forces of government.

REASONS FOR GRANTING THE PETITION

I. THERE IS CONFLICT AMONG LOWER COURTS AND BAR REGULATORS NATIONWIDE OVER WHETHER STANDARD ADVERTISING DEVICES THAT EXTEND BEYOND THE CONVEYING OF STRAIGHTFORWARD FACTUAL INFORMATION MAY BE BANNED IN LAWYER ADVERTISING ON THE RATIONALES THAT SUCH DEVICES ARE DEMEANING TO THE PROFESSION AND ARE INHERENTLY MISLEADING; IT IS IN THE BEST INTEREST OF THE PROFESSION AND THE PUBLIC FOR THIS COURT TO ADDRESS AND RESOLVE THE SUBSTANTIAL FIRST AMENDMENT ISSUES POSED BY THIS CONFLICT.

A. The Florida Court's "Demeaning to the Profession" Rationale

The Supreme Court of Florida held that the pit bull advertising devices used by John Robert Pape and Marc Andrew Chandler could be banned because the devices "demean all lawyers and thereby harm both the legal profession and the public's trust and confidence in our system of justice."[1] The Court agreed with the Florida State Bar that the pit bull advertising violated two provisions of the Rules Regulating the Florida Bar, §§ 4-7.2(b)(3) and 4-7.2((4). Those sections provide:

> (3) *Descriptive Statements.* A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.
>
> (4) *Prohibited Visual and Verbal Portrayals.* Visual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative.[2]

1. App. 1-2.

2. *See* App. 3. As the Court explained, the section of this rule reading (Cont'd)

The Court emphasized that, in Florida, only plain vanilla advertising is permissible for lawyers. The Florida disciplinary rules, the Court explained, "are designed to permit lawyer advertisements that provide objective information about the cost of legal services, the experience and qualifications of the lawyer and law firm, and the types of cases the lawyer handles." App. 5. Devices such as "sensationalist images" and "slogans," the court emphasized, are simply *never* permissible. *Id.* at 5-6.

> The comment to rule 4-7.1 provides that 'a lawyer's advertisement should provide only useful, factual information presented in a non-sensational manner. Advertisements using slogans . . . fail to meet these standards and diminish public confidence in the legal system.' The television commercial at issue here uses

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(Cont'd)

"must be objectively relevant to the selection of an attorney and" was eliminated from the rule by amendment on May 20, 2004. *See Amendment to Rules Regulating the Fla. Bar*, 875 So.2d 448, 453 (Fla.2004). App. 3. The Court below applied the former version of the rule to Pape and Chandler, but did not indicate that it would have reached any different result under the newly amended version. Indeed, the Court's elaboration on the reasoning behind the amendment only amplified the viewpoint discrimination embedded in Florida's regulation of lawyer advertising, suggesting that while pit bulls are banned, images such as the American Flag, Statute of Liberty, lightning, eagles, tool boxes, and cactuses, would be allowed. App. 3.

> Our opinion did not explain the rationale for the deletion, which was proposed by The Florida Bar. The Bar's petition reflects that the Standing Committee on Advertising proposed the deletion because the language may have been applied more restrictively than was intended, *i.e.*, to prohibit depictions of "the American flag, unless used in the context of federal law, the Statue of Liberty, unless used in the context of immigration, lightning, an eagle, a tool box, and a cactus." *Petition to Amend the Rules Regulating the Florida Bar* at 18, *Amendment to Rules Regulating the Fla. Bar*, 875 So.2d 448 (Fla.2004) (No. SC03-705). Because the older version of the rule was in place at the time that the commercial was first broadcast and when the Bar made its complaint, and was the version relied on by the referee in the hearing below, we apply that version here.

> both a sensationalistic image and a slogan, contrary to the purpose of section 4-7.

Id., citing Rule Regulating Florida Bar 4-7.1, Comment.

In reaching its decision the Court reversed the judgment of a lower referee, who had concluded that the pit bull advertising did not violate the Florida rules and were protected by the First Amendment. *Id.* at 3. The Court made it clear that its reversal was animated by the view that the pit bull advertising made a mockery of the legal profession and our system of justice. *Id.* at 11. The Court's subjective distaste for the advertising was entirely sufficient, in the Court's view, to justify its banishment. The Court reasoned that the pit bull imagery was calculated to conjure in the consumer's mind the qualities often associated with pit bulls. The Court failed to consider, however, the problem posed by the fact that depending on whom one asks, these might include either positive or negative associations, or a mix of both. Some attributes that might be associated with pit bulls are entirely consistent with a lawyer's obligations of zealous representation, such as loyalty, persistence, and tenacity.[3] The Florida Court, in contrast, projected a negative set of associations, such as "malevolence, viciousness, and unpredictability." *Id.* at 8-9. The Court made it plain that images of sharks, wolves, crocodiles, and piranhas might also be forbidden. In its peroration the Court thus explained:

> Indeed, permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice. Prohibiting advertisements such as the one

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3. The referee had observed that pit bulls are perceived as "loyal, persistent, tenacious, and aggressive," App. 4, and in turn found that these qualities were:

> objectively relevant to the selection of an attorney as they are informational, because these are qualities that a consuming public would want in a trial lawyer ... and the ad is not improperly manipulative ... The advertisement is tastefully done, the logo is not unduly conspicuous in its replacement of an ampersand between respondents' names atop the TV screen, and the large print 1-800 number is an effective mnemonic [device] tailored to maximize responses from potential clients.

> in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system. Were we to approve the referee's finding, images of sharks, wolves, crocodiles, and piranhas could follow. For the good of the legal profession and the justice system, and consistent with our Rules of Professional Conduct, this type of non-factual advertising cannot be permitted. We therefore conclude that the 1-800-PIT-BULL ad aired by the attorneys violates rules 4-7.2(b)(3) and 4-7.2(b)(4).[4]

B. The Florida Court's "Inherently Misleading" Rationale

The Florida Court held that the pit bull advertising was *inherently* misleading. App 7–8. The Court drew on comment to Florida Rule 4-7.2(b)(4) to support an interpretation of the Rule that "'prohibits visual or verbal descriptions, depictions, or portrayals in any advertisement which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer problems through characterization and dialogue ending with the lawyer solving the problem.'" *Id.* Elaborating, the Florida court endorsed the Comment's statement that "'a drawing of a fist, to suggest the lawyer's ability to achieve results, would be barred.'" *Id.* at 7. Only images depicting the most flat cliches relevant to law practice, the court explained, are permitted, such as the "scales of justice," a picture of the lawyer, or a map of the lawyer's office location. *Id.* at 8.

Applying this standard, the Court held that the pit bull advertising was "more manipulative and misleading than a drawing of a fist." *Id.* The pit bull devices, the court reasoned, "would suggest to many persons not only that the lawyers can achieve results but also that they engage in a combative style of advocacy. The suggestion is inherently deceptive

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4. App. 12–13, *citing The Florida Bar's "Ideals and Goals of Professionalism"* 1.5 ("When considering whether to advertise and what methods of advertising to use, a lawyer's first goal should be to promote and protect public confidence in a just and fair legal system founded on the rule of law.").

because there is no way to measure whether the attorneys in fact conduct themselves like pit bulls so as to ascertain whether this logo and phone number convey accurate information." *Id.* at 8. The Court reached this conclusion with no empirical data or other evidence to support it.

In a substantial digression attacking pit bull dogs as a breed, noting various legislative restrictions on pit bulls and judicial decisions resulting from pit bull attacks, the Court documented its view that far from fulfilling a traditional role as "man's best friend," pit bulls are culturally and legally notorious for their aggression. *Id.* at 8–11. Condemning what it described as "go for the jugular" advocacy, the court held that even the phone number "1-800-PIT-BULL" sticks in the memory because of its capacity to create a "nefarious association," thereby rendering "a manipulative and misleading use of what would otherwise be content-neutral information." *Id.* at 12.

In reaching its judgment, the Court made it clear that it would treat any form of self-laudatory or self-promoting content as a violation of Florida's rules, and outside the protection of the First Amendment. The Court thus relied on its prior holding in *Florida Bar v. Lange*, 711 So.2d 518, 521-22 (Fla.1998), in which it held that an advertisement that stated "When the Best is Simply Essential" was unethical and unprotected "because it was self-laudatory and purported to describe the quality of the lawyer's services." App. 6. Again, this judgment was reached without resort to any empirical data or supporting evidence. Nor did the court consider any less speech-restrictive alternative to a complete ban on the use of the pit bull advertising, such as a requirement that the advertising be accompanied by a disclaimer that would negate any potentially misleading inference that might be suggested by the advertising.

The only decisions of this Court cited by the Florida Court to support its legal analysis were *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding unconstitutional regulations banning lawyer advertisement of prices for routine legal services); *In re R.M.J.*, 455 U.S. 191 (1982) (holding unconstitutional regulations limiting the precise names of

practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91(1990) (holding unconstitutional regulations banning lawyer advertisement of certification by the National Board of Trial Advocacy). The Florida Court reasoned that those four decisions demonstrated that minimal recitation of objective facts were protected by the First Amendment. *See* App. 19. Unlike the material held protected in those decisions, the Florida Court held that the pit bull advertising of Pape and Chandler "connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment." *Id.*

C. The Nationwide Conflicts

1. The Conflict Over the Relevancy of the *Central Hudson* Test

The disarray in the decisional law governing lawyer advertising is most vividly illustrated by a fundamental conflict over whether lawyer advertising is governed by the reigning four-part commercial speech standard of *Central Hudson* and its progeny, or is a distinct body of law unto itself in which the demanding *Central Hudson* standards are diluted, adulterated, or utterly disregarded.[5] The Supreme Court of

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5. Contemporary commercial speech doctrine is governed by the four-part test first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 563-64.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Florida entirely ignored *Central Hudson*. In doing so, it was not alone.[6]

Other courts, however, treat lawyer advertising as an organic part of modern commercial speech law, subjecting it to the full force of the *Central Hudson* standard. *See, e.g., Ficker v. Curran*, 119 F.3d 1150, 1152-53 (4th Cir. 1997) (lawyer advertising issues are subject to "intermediate scrutiny under the traditional framework of *Central Hudson* . . . namely, that the government must show that its regulation directly and materially advances a substantial state interest and is 'narrowly drawn.'") *citing Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 621-25 (1995). *See also Borgner v. Brooks*, 284 F.3d 1204, 1210 (11th Cir. 2002); *Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000).

This is not a mere surface division over doctrinal labels or pigeonholes. Much is at stake in this fundamental threshold question, which speaks to the heart of the First Amendment problem. This Court has applied the *Central Hudson* standard with ever-increasing rigor, expanding protection for commercial speech, and expressing ever-heightening skepticism and impatience for governmental restrictions on advertising grounded in protectionism and paternalism.[7]

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6. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630 (1990)

> Lawyer advertising, initially an area covered by mainstream commercial speech jurisprudence, became the subject of so many cases that it developed into its own distinct area of common law. The first few cases, such as *Bates* in 1977 and *Primus* and *Ohralik* the following year, drew on the more general commercial speech doctrine to formulate rules regarding client solicitation. But, by the time we got to *R.M.J.* in 1982, *Zauderer* in 1985, and *Shapero* in 1988, that practice stopped. In its place the Court relied on the precedent of the previous decade. At present, the law of attorney advertising has grown to such an extent that it has been able to seal itself off from its roots in first amendment theory; in a field of common law that is only thirteen years old, judges often decide these cases with reference only to prior case law.

7. The trajectory of modern commercial speech law is impressive in its manifest hostility toward paternalism. *See, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357, 369-70 (2002) (striking down restrictions on

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pharmaceutical advertising); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–555 (2001) (striking down some and sustaining some restrictions on tobacco advertising); *Greater New Orleans Broadcasting Ass'n, Inc., v. United States*, 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); *44 Liquormart, Inc., v. Rhode Island*, 517 U.S. 484 (1996) striking down liquor advertizement restrictions, noting

> a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it. . . . [B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good

Rubin v. Coors Brewing Company, 514 U.S. 476 (1995) (striking down beer advertising regulations); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down restrictions on newsracks for commercial flyers and publications); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91(1990) (regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising);*Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *In re R.M.J.*, 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleadingly unconstitutional); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (striking down restrictions on advertising statements by public utilities); *In re Primus*, 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleadingly unconstitutional); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); (regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated

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To the extent that lawyer advertising is carved out as an exception to this movement, an exception in which protectionism and paternalism are allowed to run rampant, lawyer advertising is left behind, relegated to poor orphan's status. The decision of the Court below is a prime example. It is at once protectionist in its assumption that the heavy hand of regulation is needed to save the dignity of the profession and the legal system, and paternalistic in its assumption that the public will be deceived by the image of pit bulls.

2. Conflict Over the "Demeaning to the Profession" Rationale

The Florida Court made it clear that the perceived capacity of the pit bull advertising to demean the profession would be sufficient in itself to ban the advertising. Yet to "demean" is not to "deceive." To the extent that the Florida Court justified its ruling on the harm to "all lawyers" or the "justice system" caused by conjuring association with pit bulls, the implications of reaching that judgment without engaging in the rigorous test required by prongs two, three, and four of the *Central Hudson* test are breathtaking. The decision below is characteristic of a residual bias against lawyer advertising animated by a protectionist philosophy which assumes that the legal profession and the justice system will be demeaned and mocked by advertising deemed undignified.[8]

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racial status unconstitutional); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (striking down restrictions on pharmaceutical advertising); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (striking down restrictions on abortion advertising).

8. *See, e.g., In the Matter of Zang*, 154 Ariz. 134, 145-46, 741 P.2d 267, 278–79 (1987) (en banc) ("It matters less which brand of beer or soap consumers choose than what kind of lawyer they choose."); *In re Hughes & Coleman*, 60 S.W.3d 540, 544 (Ky. 2001) ("Some believe that advertising is necessary in a highly competitive field. Others deplore lawyer advertising as tasteless, boorish and degrading to the legal profession which should be distinguished from a commercial business enterprise."); *Alabama State Bar Association v. R.W. Lynch Co., Inc.*, 655 So.2d 982, 983 (Ala. 1995) ("this Court understands that lawyer advertising can, under some circumstances, be distasteful and fraught with dangers and can even demean the term 'professional'"); *In re Charges of Unprofessional Conduct Against 95-30*, 550
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Other courts, however, have rejected the "demeaning to the profession rationale." The Fourth Circuit in *Ficker v. Curran*, 119 F.3d at 1153, for example, refused to accept polling data regarding the public opinion of lawyers as a basis for restricting lawyer advertising, holding that whatever the studies might have established, the esteem or lack of esteem with which those polled held lawyers who engaged in direct-mail solicitation was not enough to justify the incursion of the First Amendment rights of lawyers to advertise to those in need of timely legal advice and representation. *See also Grievance Committee for the Hartford-New Britain Judicial District v. Trantolo*, 192 Conn. 15, 27, 470 A.2d 228, 234 (1984) ("The advertisements inform the listener of the value of professional legal assistance. . . . If some members of the audience find them distasteful, such consumers might very well react by shunning the service offered, thereby imposing an informal sanction more effective than any formal regulation.").

The regulation of lawyer advertising on the grounds that it is demeaning to the profession raises profound First Amendment difficulties warranting this Court's attention. The central core of modern First Amendment jurisprudence is that the government may never stifle a message merely because is finds the content of the message disagreeable or offensive. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Although this Court appeared to repudiate the "dignity to the profession" rationale as a basis for the regulation of lawyer advertising in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. at 647–48, it is quite clear that many bar authorities and courts nationwide have not gotten the message. *Zauderer* observed that while judges who preside over court proceedings and bar authorities who superintend the ethics of the profession within a state may certainly require lawyers

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N.W.2d 616, 617 (Minn. 1996) ("Simply because free speech allows us to make fools of ourselves is no reason we should avail ourselves of the opportunity. For then, sadly, it is the whole profession that suffers."), *quoting In re Discipline of Kotts*, 364 N.W. 2d 400, 407 (Minn. 1985) (Simonett, J., concurring specially).

to comport themselves with reasonable dignity and decorum when they appear in courtrooms, the First Amendment does not grant regulators any corresponding authority to act as "dignity-enforcers" when lawyers speak out in the general marketplace. *Id.* at 647–48. That some members of the public might find some advertising by lawyers indecorous or even offensive is not enough to justify its regulation. *Id.* at 648.

To regulate speech on the ground that it is "demeaning" is to engage in precisely the subjective, standardless exercise this Court unanimously repudiated in *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), in which the Court held that the First Amendment required a regulatory standard more exact than the epithet "outrageous." The *Hustler* case, of course, was not a commercial speech decision. But there is nothing in this Court's commercial speech jurisprudence suggesting that the First Amendment values animating *Hustler* may be ignored in the regulation of advertising. Indeed, the "dignity of the profession" rationale is not, strictly speaking, a rationale that speaks to the *commercial character* of the advertising at all.[9] In the American marketplace, it is the free action of the marketplace itself that determines the reputation of market participants, not the paternalistic intervention of government.

3. The Conflict Over Self-Laudatory Statements

The advertising of Pape and Chandler was only mildly self-laudatory, if it was self-laudatory at all. It certainly made no explicit statements regarding Pape and Chandler's skills or accomplishments, no explicit statements comparing Pape and Chandler to other lawyers, no explicit statements guaranteeing any particular outcomes or results. At most, the use of the pit-bull advertising was figurative and suggestive, calculated (as the referee below observed) to convey such qualities as "loyalty, persistence, and tenacity." App 4.

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9. In *Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 424, in which the Court refused to permit bans against newspaper kiosks for advertising circulars when traditional newspaper kiosks were allowed, the Court warned against attempts to justify regulation of commercial speech under the *Central Hudson* standard on the basis of harms that had nothing to do with the commercial character of the speech, but were of the sort common to non-commercial expression as well.

Certainly, the First Amendment would not permit the government to ban statements by service-providers *other than lawyers* explicitly promising: "If you hire me, I pledge to pursue your best interests with loyalty, persistence, and tenacity." The question thus posed is whether such a statement, made explicitly or suggestively, is not protected when made by lawyers.

The Florida Court's hostility toward self-promotion is not unique; similar prohibitions are typical in the regulatory codes of the states,[10] and have been supported by other courts. *See, e.g., Farris v. Thigpen*, 173 F.Supp.2d 427, 437 (M.D.N.C. 2001) (television commercials allegedly intimating that law firm was especially aggressive in procuring settlements from insurance companies not protected by the First Amendment); *In re Keller*, 792 N.E.2d 895 (Ind. 2003) (applying Indiana law to same

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10. Thirty-six states have language in their rules governing professional conduct of attorneys that forbids advertisements that compare an attorney's services to that of another attorney. *See* ALA. RULES OF PROF'L CONDUCT R. 7.1 (2000); ALASKA RULES OF PROF'L CONDUCT R. 7.1 (2005); ARK. RULES OF PROF'L CONDUCT R. 7.1 (2005); COLO. RULES OF PROF'L CONDUCT R. 7.1 (1998); CONN. RULES OF PROF'L CONDUCT R. 7.1; D.C. RULES OF PROF'L CONDUCT R. 7.1 (1990); FLA. RULES OF PROF'L CONDUCT R. 4-7.2 (2006); GA. RULES OF PROF'L CONDUCT R. 7.1 (2001); HAW. RULES OF PROF'L CONDUCT R. 7.1 (1994); IDAHO RULES OF PROF'L CONDUCT R. 7.1 (2004); ILL. RULES OF PROF'L CONDUCT R. 7.1 (1990); KAN. RULES OF PROF'L CONDUCT R. 7.1 (2002); KY. SUP. CT. R. 3.130(7.15) (2006); LA. RULES OF PROF'L CONDUCT R. 7.1 (2005); MD. RULES OF PROF'L CONDUCT R. 7.1; MICH. RULES OF PROF'L CONDUCT R. 7.1 (2005); MINN. RULES OF PROF'L CONDUCT R. 7.1 ; MISS. RULES OF PROF'L CONDUCT R. 7.1 (2004); MO. RULES OF PROF'L CONDUCT R. 7.1 ; NEV. SUP. CT. R. 195 (2004); N.H. RULES OF PROF'L CONDUCT R. 7.1; N.C. RULES OF PROF'L CONDUCT R. 7.1 (2003); N.D. RULES OF PROF'L CONDUCT R. 7.1 (2004); OHIO CODE OF PROF'L RESPONSIBILITY DR 2-101 (2004); OK. RULES OF PROF'L CONDUCT R. 7.1 (1991); R.I. RULES OF PROF'L CONDUCT ; S.C. RULES OF PROF'L CONDUCT R. 7.1 (2005); S.D. RULES OF PROF'L CONDUCT (2004); TENN. RULES OF PROF'L CONDUCT R. 7.1 (2004); TEX. RULES OF PROF'L CONDUCT R. 7.02 (2005); VT. RULES OF PROF'L CONDUCT R. 7.1; VA. RULES OF PROF'L CONDUCT (2005); WASH. RULES OF PROF'L CONDUCT R. 7.1 (1985); W. VA. RULES OF PROF'L CONDUCT; WIS. SUP. CT. R. 20:7.1 (2004); WYO. RULES OF PROF'L CONDUCT R. 7.1 (2002). The rules in several jurisdiction specifically forbid self-laudatory statements in advertisement. *See* IND. RULES OF PROF'L CONDUCT R. 7.2 (2006); OHIO CODE OF PROF'L RESPONSIBILITY DR 2-101 (2004); S.C. RULES OF PROF'L CONDUCT R. 7.1 (2005); S.D. RULES OF PROF'L CONDUCT (2004).

advertising campaign as *Thigpen*, and reaching same result); *Spencer v. Honorable Justices of Sup. Ct of Pennsylvania.*, 579 F.Supp. 880, 887 (E.D.Pa.1984) (rejecting constitutional challenge to attorney advertising regulation because claims "using such terms as 'experienced,' 'expert,' 'highly qualified,' or 'competent' are difficult for a layman to confirm, measure, or verify"); *In re PRB Docket No. 2002.093*, 868 A.2d 709 (Vt. 2005) ("Direct claims of expertise that are not truthful and factually verifiable, however, may be prohibited or restricted as unduly misleading.").[11]

Perhaps the sharpest contrast with the decision below on this issue is provided by *Mason v. Florida Bar*, 208 F.3d at 959, rendered by the United States Court of Appeals for the Eleventh Circuit, the federal circuit in which Florida sits. In *Mason*, the court struck down a Florida prohibition on lawyer advertising containing "self-laudatory statements." *Id.*[12] The court in *Mason* rejected an interest proffered by Florida—its claimed interest in encouraging attorney rating services to use objective criteria. *Id.* at 956. ("Although the Bar

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11. This distrust of self-promotion is sometimes especially acute when television and radio advertising is employed, on the theory that such electronic advertising is inherently manipulative. *See Committee on Professional Ethics and Conduct of the Iowa Bar Association v. Humphrey*, 377 N.W.2d 643, 646 (Iowa 1985) ("We continue to believe the 'special problems' recognized by the United States Supreme Court exist in the field of electronic advertising. These problems warrant a special rule to regulate lawyer advertising in the electronic media.").

12. The Florida rule provided that: "A lawyer shall not make statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communication." *Id.* at 954. In *Mason* the court struck down the application of this standard to an advertisement in the Yellow Pages stating that a lawyer was "'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory." *Id.* The Bar issued an opinion that the advertisement violated the rule against self-laudatory statements, notifying Mason that his advertisement must include a full explanation as to the meaning of the Martindale-Hubbell AV rating and how the publication chooses the participating attorneys, including the fact that the Martindale-Hubbell AV ratings are based exclusively on opinions expressed by confidential sources and that the publication does not undertake to rate all Florida attorneys. *Id.*

has asserted two substantial interests in the abstract, its restrictions on Mason's speech do not necessarily serve those interests. . . . A state cannot satisfy its burden to demonstrate that the harms it recites are real and that its restrictions will alleviate the identified harm by rote invocation of the words 'potentially misleading.') citing *Ibanez*, 512 U.S. at 146; *Edenfield*, 507 U.S. at 771, 773.[13]

More broadly, prohibitions on self-laudatory statements are in fundamental conflict with the whole point of advertising. *See* Roy Simon, *The 1999 Amendments to the Ethical Considerations in New York's Code of Professional Responsibility*, 29 Hofstra L. Rev. 265, 266–67 (2000) ("But have you ever seen an advertisement that does not laud the lawyer? Have you ever seen a lawyer advertise by stating that he is not such a good lawyer, but that you should call him because he needs the business?"). There was no empirical data or other evidence offered by the Florida Court to support the highly implausible assumption that any members of the Florida public were deceived or seduced by the mere conjuring the image of pit bulls, and it strains credulity to maintain that any such deceit was so manifestly self-evident as to render the pit bull advertizing *inherently* misleading.

4. The Conflict Over the Use of Stock Advertising Devices

The decision of the Supreme Court of Florida appeared to adopt a "zero tolerance" position toward inclusion of any elements in lawyer advertising beyond bare-boned recitations of objective facts. The pit bull image used by Pape and Chandler was a relatively pallid example of the use of logos, symbols, catchy phrases, jingles, music, dance, humor, parody, surprise, sarcasm, drama, puffery, and figurative hyperbole

13. *See also Allen, Allen, Allen, & Allen v. Williams*, 254 F.Supp.2d 614 (E.D. Va. 2003) (issuing a preliminary injunction against the Virginia State Bar, enjoining disciplinary action by Virginia against a law firm for a television advertising campaign that touted the fact that lawyers in the firm had been selected in the reference work "Best Lawyers in America," including the statement: "If you've been injured, call the lawyers other lawyers have called the best.").

that are standard, stock devices in modern advertising.[14] As the Supreme Court of New Jersey recognized in its lawyer advertising decision, *In the Matter of the Petition of Felmeister & Isaacs*, 104 N.J. 515, 537, 518 A.2d 188, 199 (1986), the techniques of modern advertising that make advertising *most* effective are often techniques of drama or image-making that grab the consumer's attention and make an advertisement memorable. *Id.* at 526–30. The pit bull advertising in contest here was a relatively innocuous example of such a device, yet even it was found intolerable by the Florida Court.

Florida's approach is mirrored by those of numerous other jurisdictions tolerating no gloss in lawyer advertising beyond the bare-boned facts.[15] This hostility to any emotional or dramatic coloration in lawyer advertising, however, is not uniformly accepted.[16] Attempting to straddle the two

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14. Modern advertising is *all about* being "catchy" and using the devices of drama, arts, color, sound, fiction, fantasy, or comedy. See Ronald K. L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697 (1993) (critiquing this trend); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993) (defending this trend).

15. *See, e.g. Farrin v. Thigpen* 173 F.Supp.2d at 437 (sustaining disciplinary actions of North Carolina bar against lawyer television advertising involving fictional vignettes in which insurance company officials are portrayed as anxious to seek settlement when a particular plaintiff's personal injury firm is identified as plaintiff's counsel); *Office of Disciplinary Counsel v. Furth*, 93 Ohio St.3d 173, 754 N.E.2d 219, 225, 231–32 (2001); (attorney's web site claiming to be "passionate and aggressive advocate" violated rule prohibiting unverifiable self-laudatory statements); *Medina County Bar Ass'n v. Grieselhuber*, 78 Ohio St.3d 373, 678 N.E.2d 535, 537 (1997) (lawyer's Yellow Pages advertisement claiming "We Do It Well" violated rule against communication of claims that could not be verified); *In the Matter of Zang, supra*, 154 Ariz. at 145–46.

> We recognize, of course, that another primary purpose of advertising is to convince consumers to call a particular lawyer. While this focus is not objectionable standing alone, it often leads attorneys to stretch the truth or to focus on dramatic, 'sophisticated' sales techniques that all too often provide little helpful information and consequently have a greater tendency to mislead consumers.

16. *See, e.g., Oklahoma Bar Association v. Schaffer*, 648 P.2d 355, 358–59 (Okla. 1982)

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positions, some courts have sought to stake out a middle ground.[17]

When communication is not reasonably understood as false in its "literal" sense, but is rather reasonably understood as merely "figurative" or "exaggeration" or "boasting" of the type not to be understood literally, it is normally protected by the First Amendment. Mere figurative use of speech cannot be tortious, *see Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), cannot be a criminal "true threat," *see Virginia v. Black*, 538 U.S. 343, 358–60 (2003), *Watts v. United States*, 394 U.S. 705, 708 (1969), and (at least as to all fields of endeavor outside of law practice) cannot be "false advertising,"[18] It is beyond

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> This advertisement, it is argued, appeals solely to the emotions of the reader. It does not impart knowledge designed to foster informed and reliable decision making for counsel selection. The trial authority described the adoption ad as a form of puffery, i.e., one that, though not deceptive, diverts attention of potential clients from the attorney's qualifications to extraneous and irrelevant matters. . . . We find this ad free of any information which could potentially deceive or mislead the public. Nor are we persuaded by the argument that a substantial interest of the state is served by the restriction sought to be imposed on this genre of lawyer advertising.

17. In *In the Matter of the Petition of Felmeister & Isaacs*, 104 N.J. 515, 537, 518 A.2d 188, 199 (1986), the court noted that the techniques of modern advertising that make advertising *most* effective are often techniques of drama or image-making that grab the consumer's attention and make an advertisement memorable. These modern techniques do not convey "hard" information and tend to encourage consumers to make decisions not for rational analytic reasons related to concrete information, but for reasons that are less rational and more emotive. *Id.* at 526–30. The court allowed attorneys to employ non-informational dramatic or emotional elements in advertising, provided that the informational elements were the predominate material in the advertisement. The court limited this compromise, however, to advertising other than television. Evidencing a special distrust of television ads, the court imposed a more restrictive rule on television ads, not allowing any emotional appeals. *Id.* at 529–30.

18. *See The New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 309 (9th Cir. 1992) (rejecting a Lanham Act claim by pop music group "The New Kids on the block," noting that "The New Kids could not use the trademark laws to prevent . . . or to censor all parodies or satires

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peradventure that outside of the insular world of bar regulation, the mere use of the pit bull imagery here would *never* suffice to support a traditional false advertising claim. The pit bull images would be dismissed as the sort of catchy but innocuous puffing typical of mass advertising, insufficient to trigger the fundamental requirement that a reasonable consumer would treat it as a hard assertion of fact worthy of reliance. *See generally* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:38 (4th ed. 1997) ("'Puffing' is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely"); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 109, at 757 (5th ed.1984) (Noting that a seller is protected from puffing as long as he says nothing specific, "on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk.") This is the standard understanding of false advertising, and under the First Amendment, this is the law of the land.[19] Florida's approach,

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which use their name."); *Rogers v. Grimaldi*, 875 F.2d 994 (2nd Cir. 1989) (rejecting a Lanham Act false advertising claim on First Amendment grounds).

19. Nonactionable puffery includes representations of product superiority that are vague or highly subjective. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir.1997) (advertising that merely states in general terms that one product is superior is not actionable); *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir.1990) (defining "puffing" as "advertising that is not deceptive for no one would rely on its exaggerated claims.") *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir.1997) (defining "puffing" for Lanham Act purposes as "exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely and is not actionable under 43(a)"); *Cook, Perkiss & Liehe, Inc. v. Northern California Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir.1990) (stating that "[p]uffing has been described by most courts as involving outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers"); *United Industries Corporation v. The Clorox Company*, 140 F.3d 1175, 1180 (8th Cir. 1998) ("Many claims will actually fall into a third category, generally known as 'puffery' or 'puffing.' Puffery is 'exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under § 43(a).'"); *Castrol Inc. v. Pennzoil*

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like that of other jurisdictions hostile to any emotional gloss or puffery in lawyer advertising, effectively turns the normal First Amendment rule upside down. The unbending rule in Florida, mirrored in the rules of many states, is that is that "non-objective" expression, even in a form so figurative as the image of a put bull, is unprotected. A principal evil of such a regime is that it tends to act as *in terrorem* chills on freedom of expression. It has the practical effect of reversing the normal balance in our legal system, in which an individual is deemed innocent until proven guilty, a reversal that is particularly onerous when First Amendment rights are involved. *See, e.g., Virginia v. Black*, 538 U.S. at 366-67 (striking down a presumption in Virginia law that all cross-burning conveyed a "threat," placing the onus on the defendant to overcome the presumption); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.").[20]

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Co., 987 F.2d 939, 945 (3d Cir.1993) (same); 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:38 (4th ed.1997). ("[V]ague advertising claims that one's product is 'better' than that of competitors' can be dismissed as mere puffing that is not actionable as false advertising.").

20. The paternalism that animated the decision below cannot be justified simply by reciting that "go for the jugular" advocacy is somehow inherently unethical or illegal. Lawyers may "go for the jugular" by addressing with concentrated zeal the core of the legal, factual, and policy issues in contest. This Court has itself recognized this, once paying homage to the famous advocate John W. Davis, who touted the need to "go for the jugular." *Jones v. Barnes*, 463 U.S. 745, 753 (1983) ("A brief that raises every colorable issue runs the risk of burying good arguments – those that, in the words of the great advocate John W. Davis, 'go for the jugular'"), *quoting* John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940). Similarly, the phrase "go for the jugular" was a favorite of Justice Hugo Black, advice that he used to counsel fellow Justices of this Court, lawyers, and law students alike. *See* Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry A. Blackmun*, 34 U. RICH. L. REV. 285, 297 (2000) ("Walking into the junior Justice' chambers and carrying an opinion that Blackmun had circulated, Black enthused, 'Harry, I like it.
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5. Conflict Over the Meaning of "Inherently Misleading"

The Supreme Court of Florida's utter disregard of the *Central Hudson* test generated two subsidiary conflicts with decisions from other jurisdictions. First, the opinion of the Florida Court was not supported by any empirical data or objective evidence establishing the misleading character of the ads. This position, by no means unique to Florida,[21] is in conflict with decisions of other courts requiring such objective support.[22] Second, the Florida Court did not pause to consider

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It goes for the jugular. Always go for the jugular, but don't agonize in public.'"); Arthur Kinoy, *The Role of the People's Lawyer in the 1990s*, 2 TEMPLE POL. & CIV. RTS. L. REV. 209, 220 (1993) ("We remembered . . . Hugo Black. He always said to young students and lawyers all over the country that when you are in the midst of a serious Constitutional struggle, go for the jugular, lay it on the line.").

21. The Florida decision represents a common position on a contentious national spectrum, in which bar regulators and courts have dispensed with any requirement of evidence when the material at issue is deemed "inherently misleading" or even "potentially misleading." *See In re Keller*, 792 N.E.2d at 869, n.3 (no evidence of actual deception required if expression is potentially misleading); *Matter of Anonymous*, 775 N.E.2d 1094, 1095 (Ind. 2002) (same); *Farrin v. Thigpen*, 173 F.Supp.2d at 437 (same); *Langlitz v. Board of Registration of Chiropractors*, 396 Mass. 374, 486 N.E.2d 48, 53 (1985) (holding that it was not necessary to show resulting harm to the public because "[t]he board's determination that the advertisement was inherently misleading was a matter of common experience and common sense, based on the appearance and content of the advertisement itself"); *In the Matter of Zang*, 154 Ariz. 134, 741 P.2d 267 (1987) (en banc) (holding that no expert testimony was needed to interpret the messages conveyed by the ad because the court could rely on common sense).

22. In cases in which the communication is not manifestly false or misleading on its face, most courts have held empirical evidence supporting the restriction on lawyer advertising is required. *See, e.g., Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997); *Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002) ("Courts have generally required the state to present tangible evidence that the commercial speech in question is misleading and harmful to consumers before they will find that restrictions on such speech satisfy *Central Hudson*'s third prong.") *citing Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 147 (1994); *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108-09 (1990); *Bingham v. Hamilton*, 100 F.Supp.2d
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whether some less severe alternative to an outright ban on the speech, such as a disclaimer requirement, would have sufficed to negate any potentially misleading messages the pit bull advertising might allegedly convey.[23] The Eleventh

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1233, 1240 (E.D.Cal.2000). *See also Revo v. Disciplinary Board of the Supreme Ct. for New Mexico*, 106 F.3d 929, 933 (10th Cir.1997) (holding an advertisement was not inherently misleading, noting that "for a particular mode of communication to be inherently misleading, it must be incapable of being presented in a way that is not deceptive," and noting that the bar's disciplinary board had offered "no evidence that anyone was actually deceived" by the ads, stating that "the 'concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.'") *quoting Peel v. Attorney Disciplinary Comm'n of Illinois*, 496 U.S. 91, 111 (1990); *citing Ibanez v. Florida Dep't of Bus. & Prof. Regulation*, 512 U.S. 136, 145–46 (1994); *In re R.M.J.*, 455 U.S. 191, 203 (1982). *See also Schwartz v. Welch*, 890 F.Supp. 565, 574–76 (S.D.Miss.1995) (striking down Mississippi restrictions on lawyer advertizing, noting that while other bar restrictions on advertising in other forums had been upheld, Mississippi had failed to sustain its burden of proof); *Lyon v. Alabama State Bar*, 451 So.2d 1367, 1372–73 (1984) (reversing disciplinary action against attorneys because bar failed to introduce evidence that the words "Videc Taped Will" caused the advertisement to be misleading, but relied instead on the questions asked by the Board during the hearing as evidence, but sustaining other disciplinary action against attorneys for failure to adhere to disclosure requirements regarding representations concerning the quality of legal services.)

23. The decision of the Supreme Court of Florida is in tension with numerous decisions of other courts that have held that disclaimer and disclosure requirements should be employed whenever feasible as an alternative to outright prohibitions on lawyer advertising. *See, e.g., Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002)

> Disclaimers are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks. Courts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total ban on commercial speech.

citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985); *Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir.1992); *Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002) ("Courts have generally required the state to present tangible evidence that the commercial speech in question is misleading and harmful to consumers

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Circuit's decision in *Mason v. Florida Bar*, 208 F.3d at 959, again supplies a vivid conflict with the decision below, holding that advertising could not be disciplined under the Florida standard on either the theory that it was misleading or potentially misleading, because the state had failed to support its claims with any evidence other than the claim that it was "common sense" that such advertising could mislead an unsophisticated public.[24]

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before they will find that restrictions on such speech satisfy *Central Hudson's* third prong.") *citing Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 147 (1994); *Peel v. Attorney Registration & Disciplinary Commission of Illinois.*, 496 U.S. 91, 108–09 (1990); *Bingham v. Hamilton*, 100 F.Supp.2d 1233, 1241 (E.D. Cal. 2000); *Walker v. Board of Responsibility of the State of Tennessee*, 38 S.W.3d 540, 545 (Tenn. 2001) ("This regulation does not prohibit or limit speech; instead it requires more speech by way of an explanatory disclaimer. The fact that the regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment.") *citing Douglas v. State*, 921 S.W.2d 180 (Tenn. 1996) (same); *Commodity Trend Services, Inc. v. Commodity Futures Trading Commission*, 233 F.3d 981, 994 (7th Cir.2000) ("The government can impose affirmative disclosures in commercial advertising if these are reasonably related to preventing the public from being deceived or misled."); *Commodity Futures Trading Commission v. Vartuli*, 228 F.3d 94, 108 (2d Cir.2000).

24. Other courts have similarly refused to accept as "misleading" all statements that go beyond sterile bare-bones recitations of basic information. *See, e.g., In Matter of Disciplinary Proceedings Against Marcus*, 107 Wis.2d 560, 320 N.W. 2d 806 (1982) (the party which is seeking to have discipline imposed for publishing an advertisement which is allegedly false, misleading or deceptive in violation of the Code of Professional Responsibility bears burden of proving by clear and satisfactory evidence that the advertisement violates the rule; the newspaper advertisements did not create an overall impression which was false, misleading or deceptive, and none of the statements in the ads were false, misleading or deceptive, and thus the advertisements did not warrant imposing discipline upon attorneys); *Capoccia v. Committee on Prof'l Standards*, No. 89-CV-866, 1990 WL 211189 (N.D.N.Y. Dec. 20, 1990) (holding that the statement "If you've been injured you deserve a fast fair cash compensation" was not inherently misleading because it was true, given that New York had an insurance system where compensation was to be paid promptly and without regard to the driver's fault and that the state bar failed to show a substantial government interest under *Central Hudson*).

CONCLUSION

Petitioners respectfully urge this Court to grant the Petition for Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF FLORIDA DATED NOVEMBER 17, 2005

SUPREME COURT OF FLORIDA

No. SC04-40

THE FLORIDA BAR,

Complainant,

vs.

JOHN ROBERT PAPE,

Respondent.

No. SC04-41

THE FLORIDA BAR,

Complainant,

vs.

MARC ANDREW CHANDLER,

Respondent.

[November 17, 2005]

PARIENTE, C.J.

In this case we impose discipline on two attorneys for their use of television advertising devices that violate the Rules of Professional Conduct. These devices, which invoke

the breed of dog known as the pit bull, demean all lawyers and thereby harm both the legal profession and the public's trust and confidence in our system of justice.[1]

We conclude that attorneys Pape and Chandler ("the attorneys") violated Rules Regulating the Florida Bar 4-7.2(b)(3) and 4-7.2(b)(4) by using the image of a pit bull and displaying the term "pit bull" as part of their firm's phone number in their commercial. Further, because the use of an image of a pit bull and the phrase "pit bull" in the firm's advertisement and logo does not assist the public in ensuring that an informed decision is made prior to the selection of the attorney, we conclude that the First Amendment does not prevent this Court from sanctioning the attorneys based on the rule violations. We determine that the appropriate sanctions for the attorneys' misconduct are public reprimands and required attendance at the Florida Bar Advertising Workshop.

BACKGROUND AND PROCEDURAL HISTORY

On January 12, 2004, The Florida Bar filed complaints against the attorneys, alleging that their law firm's television advertisement was an improper communication concerning the services provided, in violation of the Rules of Professional Conduct. The advertisement included a logo that featured an image of a pit bull wearing a spiked collar and prominently displayed the firm's phone number, 1-800-PIT-

1. We have jurisdiction. *See* art. V, § 15, Fla. Const. ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.").

BULL. The Bar asserted that this advertisement violated the 2004 version of Rules Regulating the Florida Bar 4-7.2(b)(3) and 4- 7.2(b)(4), which state:

> (3) *Descriptive Statements.* A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.
>
> (4) *Prohibited Visual and Verbal Portrayals.* Visual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative.[2]

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2. The section of this rule reading "must be objectively relevant to the selection of an attorney and" was eliminated from the rule by amendment on May 20, 2004. *See Amendment to Rules Regulating the Fla. Bar*, 875 So.2d 448, 453 (Fla.2004). Our opinion did not explain the rationale for the deletion, which was proposed by The Florida Bar. The Bar's petition reflects that the Standing Committee on Advertising proposed the deletion because the language may have been applied more restrictively than was intended, i.e., to prohibit depictions of "the American flag, unless used in the context of federal law, the Statue of Liberty, unless used in the context of immigration, lightning, an eagle, a tool box, and a cactus." Petition to Amend the Rules Regulating the Florida Bar at 18, *Amendment to Rules Regulating the Fla. Bar*, 875 So.2d 448 (Fla.2004) (No. SC03-705). Because the older version of the rule was in place at the time that the commercial was first broadcast and when the Bar made its complaint, and was the version relied on by the referee in the hearing below, we apply that version here.

Appendix A

The referee found that the attorneys did not violate rule 4-7.2(b)(3), relying on the distinction that the logo and telephone number "describe qualities of the respondent attorneys" but do not describe or characterize "the quality of the lawyer services." The referee also rejected the Bar's assertion that the ad violated rule 4-7.2(b)(4). After noting that pit bulls are perceived as "loyal, persistent, tenacious, and aggressive," the referee found these qualities

> objectively relevant to the selection of an attorney as they are informational, because these are qualities that a consuming public would want in a trial lawyer . . . and the ad is not improperly manipulative. . . . The advertisement is tastefully done, the logo is not unduly conspicuous in its replacement of an ampersand between respondents' names atop the TV screen, and the large print 1-800 number is an effective mnemonic [device] tailored to maximize responses from potential clients.

The referee also concluded that the ad was protected speech and therefore that an interpretation of rules 4-7.2(b)(3) and 4-7.2(b)(4) to prohibit the ad would render the rules unconstitutional as applied.

ANALYSIS

Generally, a "referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record." *Fla. Bar v. Senton*, 882 So.2d 997, 1001 (Fla.2004) (quoting

Fla. Bar v. Wohl, 842 So.2d 811, 814 (Fla.2003)). However, where there are no genuine issues of material fact and the only disagreement is whether the undisputed facts constitute unethical conduct, the referee's findings present a question of law that the Court reviews de novo. *See Rykiel v. Rykiel*, 838 So.2d 508, 510 (Fla.2003) (stating that if the issue presented in a decision is a pure question of law, the decision is subject to de novo review); *Fla. Bar v. Cosnow*, 797 So.2d 1255, 1258 (Fla.2001) (concluding that whether the attorney's admitted actions constitute unethical conduct is a question of law). The facts are not in dispute, and therefore our review is de novo.

A. Violation of Attorney Advertising Rules

As a preliminary matter, the pit bull logo and 1-800-PIT-BULL telephone number in the ad by the attorneys do not comport with the general criteria for permissible attorney advertisements set forth in the comments to section 4-7 of the Rules of Professional Conduct. The rules contained in section 4-7 are designed to permit lawyer advertisements that provide objective information about the cost of legal services, the experience and qualifications of the lawyer and law firm, and the types of cases the lawyer handles. *See generally* R. Regulating Fla. Bar 4-7.1 cmt. The comment to rule 4-7.1 provides that "a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner. Advertisements using slogans . . . fail to meet these standards and diminish public confidence in the legal system." The television commercial at issue here uses both

a sensationalistic image and a slogan,[3] contrary to the purpose of section 4-7.

More specifically, the attorneys' ad violated rule 4-7.2(b)(3), which prohibits the use of statements describing or characterizing the quality of the lawyer's services. In *Florida Bar v. Lange*, 711 So.2d 518, 521-22 (Fla.1998), we approved the referee's finding that an advertisement that stated "When the Best is Simply Essential" violated the predecessor provision to rule 4-7.2(b)(3) because it was self-laudatory and purported to describe the quality of the lawyer's services. In this case, the simultaneous display of the pit bull logo and the 1-800-PIT-BULL phone number conveys both the characteristics of the attorneys and the quality of the services they purport to provide. At the very least, the printed words and the image of a pit bull in the television commercial could certainly be perceived by prospective clients as characterizing the quality of the lawyers' services.

On this question we disagree with the referee, who distinguished the "quality of the lawyer's services" from the qualities (i.e., traits or characteristics) of the lawyer. We conclude that this is an artificial distinction which unduly limits the scope of the rule by interpreting "quality of the lawyer's services" in the narrowest sense. From the perspective of a prospective client unfamiliar with the legal system and in need of counsel, a lawyer's character and

3. Among the definitions of "slogan" are "a brief attention-getting phrase used in advertising or promotion" and "a word or phrase used to express a characteristic position or stand or a goal to be achieved." *Merriam-Webster's Collegiate Dictionary* 1105 (10th ed.1999).

personality traits are indistinguishable from the quality of the services that the lawyer provides. A courteous lawyer can be expected to be well mannered in court, a hard-working lawyer well prepared, and a "pit bull" lawyer vicious to the opposition. In the attorneys' advertisement, the pit bull image appears in place of an ampersand between the attorneys' names, and the ad includes the use of the words "pit bull" in the attorneys' telephone number in large capital letters. The combined effect of these devices is to lead a reasonable consumer to conclude that the attorneys are advertising themselves as providers of "pit bull"-style representation. We consider this a characterization of the quality of the lawyers' services in violation of *rule 4-7.2(b)(3)*.

We also conclude that the ad violates rule 4-7.2(b)(4), which requires that visual or verbal depictions be "objectively relevant" to the selection of an attorney, and prohibits depictions that are "deceptive, misleading, or manipulative." The comment to this rule explains that it

> prohibits visual or verbal descriptions, depictions, or portrayals in any advertisement which create suspense, or contain exaggerations or *appeals to the emotions*, call for legal services, or create consumer problems through characterization and dialogue ending with the lawyer solving the problem. Illustrations permitted under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), are informational and not misleading, and are therefore permissible. As an example, *a drawing of a fist, to suggest the*

> *lawyer's ability to achieve results, would be barred.* Examples of permissible illustrations would include a graphic rendering of the scales of justice to indicate that the advertising attorney practices law, a picture of the lawyer, or a map of the office location.

(Emphasis supplied.) The logo of the pit bull wearing a spiked collar and the prominent display of the phone number 1-800-PIT-BULL are more manipulative and misleading than a drawing of a fist. These advertising devices would suggest to many persons not only that the lawyers can achieve results but also that they engage in a combative style of advocacy. The suggestion is inherently deceptive because there is no way to measure whether the attorneys in fact conduct themselves like pit bulls so as to ascertain whether this logo and phone number convey accurate information.

In addition, the image of a pit bull and the on-screen display of the words "PIT-BULL" as part of the firm's phone number are not objectively relevant to the selection of an attorney. The referee found that the qualities of a pit bull as depicted by the logo are loyalty, persistence, tenacity, and aggressiveness. We consider this a charitable set of associations that ignores the darker side of the qualities often also associated with pit bulls: malevolence, viciousness, and unpredictability. Further, although some may associate pit bulls with loyalty to their owners,[4] the manner in which the

4. Even the perception of loyalty may be unwarranted. In June, a twelve-year old boy was mauled to death in San Francisco by his family's two pit bulls. *See* Jaxon Van Derbeken et al., *S.F. Boy, 12,* (Cont'd)

pit bull is depicted in the attorneys' ad in this case certainly does not emphasize this association. The dog, which is wearing a spiked collar, directly faces the viewer and is shown alone, with no indication that it is fulfilling its traditional role as "man's best friend."

Pit bulls have a reputation for vicious behavior that is borne of experience. According to a study published in the Journal of the American Veterinary Medical Association in 2000, pit bulls caused the greatest number of dog-bite-related fatalities between 1979 and 1998. Jeffery J. Saks, et al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998*, 217 J. Am. Veterinary Med. Ass'n 836, 837 (2000), *available at http://www.cdc.gov/ncipc/duip/dogbreeds.pdf*.[5] The dangerousness of pit bulls has also been recognized in a number of court decisions. *See, e.g., Giaculli v. Bright*, 584 So.2d 187, 189 (Fla. 5th

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Killed by His Family's Pit Bulls Shocked Inner Sunset Neighbors Call 911 as His Mother Screams: "Help Me!" San Francisco Chron., June 4, 2005, *available at* http://sfgate.com/ cgi-bin/article.cgi? file=/c/a/2005/06/03/ BAdog maul03.DTL. That same month a Bay Area woman suffered severe injuries in an attack by her nine-year-old pit bull. *See* Chuck Squatriglia, *Woman Mauled by Her Pit Bull*, San Francisco Chron., June 7, 2005, *available at* http:// sfgate.com/ cgi-bin/ article.cgi? file=/c/a/2005/06/15 /BApitbull15.DTL. A St. Louis man was killed in May by his two pit bulls that had "no apparent history of aggression and [were] described as well-kept." CBS News.com, *Pit Bulls Kill Owner in Home*, May 12, 2005, http://www.cbsnews. com/stories/2005/05/12 /national/main694926. shtml.

5. Of the 238 fatalities accounted for in the study, pit bulls were responsible for 76, or approximately 32 percent. *See id.*

DCA 1991) (recognizing that "[p]it bulls as a breed are known to be extremely aggressive and have been bred as attack animals"); *Hearn v. City of Overland Park*, 244 Kan. 638, 772 P.2d 758, 768 (1989) ("[P]it bull dogs represent a unique public health hazard not presented by other breeds or mixes of dogs. Pit bull dogs possess both the capacity for extraordinarily savage behavior and physical capabilities in excess of those possessed by many other breeds of dogs. Moreover, this capacity for uniquely vicious attacks is coupled with an unpredictable nature."); *Matthews v. Amberwood Assocs. Ltd. Partnership, Inc.*, 351 Md. 544, 719 A.2d 119, 127 (1998) ("The extreme dangerousness of [the pit bull] breed, as it has evolved today, is well recognized.").

In *State v. Peters*, 534 So.2d 760 (Fla. 3d DCA 1988), the Third District Court of Appeal upheld a City of North Miami ordinance imposing substantial insurance, registration, and confinement obligations on owners of pit bulls. The City of North Miami ordinance contained findings that pit bulls have a greater propensity to bite humans than all other breeds, are extremely aggressive towards other animals, and have a natural tendency to refuse to terminate an attack once it has begun. *See id.* at 764.[6] The current

6. The findings contained in the ordinance, which were unchallenged, stated:

> "WHEREAS, dogs commonly referred to as 'Pit Bulls' were for centuries developed and selectively bred for the express purpose of attacking other dogs or other animals such as bulls, bears, or wild hogs; and
>
> "WHEREAS, in developing a dog for this purpose, certain traits were selected and maximized by controlled

(Cont'd)

Appendix A

Miami-Dade County ordinance provides that it is illegal to own a pit bull. *See* Miami-Dade County, Fla.Code, § 5-17 (1992).[7]

(Cont'd)

> breeding, including extremely powerful jaws, a high sensitivity to pain, extreme aggressiveness towards other animals, and a natural tendency to refuse to terminate an attack once it has begun; and
>
> "WHEREAS, in addition to statistical evidence that Pit Bull Dogs have a greater propensity to bite humans than all other breeds, there exists overwhelming evidence in the form of individual experiences, that the Pit Bull is infinitely more dangerous once it does attack; and
>
> "WHEREAS, the Pit Bull's massive canine jaws can crush a victim with up to two thousand (2,000) pounds of pressure per square inch—three times that of a German Shepherd or Doberman Pinscher, making the Pit Bull's jaws the strongest of any animal, per pound; and
>
> "WHEREAS, after consideration of the facts, this Council has determined that the following Ordinance is reasonable and necessary for the protection of the public health, safety and welfare."

Id. at 764.

7. Other jurisdictions have also passed laws banning pit bulls. *See* TheDenverChannel.com, *Pit Bulls Banned Again in Denver*, May 9, 2005, http://www.thed enver channel.com/news/446 7849/ detail.html; Pam Douglas, New bylaws in effect for pit bulls, more on the way, The Brampton Guardian, Oct. 7, 2005, *available at* http://www.northpeel .com/br/news/story/ 3081254p-3574295c.html.

Appendix A

This Court would not condone an advertisement that stated that a lawyer will get results through combative and vicious tactics that will maim, scar, or harm the opposing party, conduct that would violate our Rules of Professional Conduct. *See, e.g.*, R. Regulating Fla. Bar 4-3.4(g)-(h) (prohibiting threats to present criminal or disciplinary charges solely to gain an advantage in a civil matter). Yet this is precisely the type of unethical and unprofessional conduct that is conveyed by the image of a pit bull and the display of the 1- 800-PIT-BULL phone number. We construe the prohibitions on advertising statements that characterize the quality of lawyer services and depictions that are false or misleading to prohibit a lawyer from advertising his or her services by suggesting behavior, conduct, or tactics that are contrary to our Rules of Professional Conduct.

Further, we reject the referee's finding that the use of the words "pit bull" in the phone number is merely a mnemonic device to help potential clients remember the attorneys' number. Phrase-based phone numbers are memorable because of the images and associations they evoke. The "1-800-PIT-BULL" phone number sticks in the memory precisely because of the image of the pit bull also featured in the ad, the association of pit bulls with the characteristics discussed herein, and the "go for the jugular" style of advocacy that some persons attribute to lawyers. In short, this is a manipulative and misleading use of what would otherwise be content-neutral information to create a nefarious association.

Indeed, permitting this type of advertisement would make a mockery of our dedication to promoting public trust

and confidence in our system of justice.[8] Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system. Were we to approve the referee's finding, images of sharks, wolves, crocodiles, and piranhas could follow. For the good of the legal profession and the justice system, and consistent with our Rules of Professional Conduct, this type of non-factual advertising cannot be permitted. We therefore conclude that the 1-800-PIT-BULL ad aired by the attorneys violates rules 4-7.2(b)(3) and 4-7.2(b)(4).

B. First Amendment Protection of Lawyer Advertising

We also disagree with the referee's conclusion that the application of rules 4-7.2(b)(3) and 4-7.2(b)(4) to prohibit this advertisement violates the First Amendment. Lawyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information that can be objectively verified. This thread runs throughout the pertinent United State Supreme Court precedent.

The seminal lawyer advertising case is *Bates v. State Bar of Arizona*, 433 U.S. 350, 376, 97 S.Ct. 2691, 53 L.Ed.2d

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8. The Florida Bar's "Ideals and Goals of Professionalism," adopted by the Bar's Board of Governors in 1990, include the following relevant aspirational guideline:

> 1.5. When considering whether to advertise and what methods of advertising to use, a lawyer's first goal should be to promote and protect public confidence in a just and fair legal system founded on the rule of law.

810 (1977), which involved the advertising of fees for low cost legal services. In *Bates*, the Supreme Court held generally that attorney advertising "may not be subjected to blanket suppression," and more specifically that attorneys have the constitutional right to advertise their availability and fees for performing routine services. *Id.* at 383-84, 97 S.Ct. 2691. The cost of legal services, the Supreme Court concluded, would be "relevant information needed to reach an informed decision." *Id.* at 374, 97 S.Ct. 2691.

In reaching this conclusion the Supreme Court recognized that "[a]dvertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange." *Id.* at 376, 97 S.Ct. 2691. "[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." *Id.* at 364, 97 S.Ct. 2691 (citation omitted).

The Supreme Court emphasized that advertising by lawyers could be regulated and noted that "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.* at 383, 97 S.Ct. 2691. The Supreme Court specifically declined to address the "peculiar problems associated with advertising claims relating to the quality of legal services," but observed that "[s]uch claims *probably are not susceptible of precise measurement or verification*

and, under some circumstances, might well be deceptive or misleading to the public, or even false." *Id.* at 366, 97 S.Ct. 2691 (emphasis supplied).

After *Bates*, the Supreme Court considered a Missouri rule that restricted lawyer advertising to newspapers, periodicals, and the yellow pages, and limited the content of these advertisements to ten categories of information (name, address and telephone number, areas of practice, date and place of birth, schools attended, foreign language ability, office hours, fee for an initial consultation, availability of a schedule of fees, credit arrangements, and the fixed fee charged for specified "routine" services). *See In re R.M.J.*, 455 U.S. 191, 194, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). Even the manner of listing areas of practice was restricted to a prescribed nomenclature. *See id.* at 194-95, 102 S.Ct. 929. In violation of the state restrictions, the lawyer advertised areas of practice that did not use the prescribed terminology, listed the states in which the lawyer was licensed, specified that he was admitted to practice before the United States Supreme Court, and did not restrict the recipients of announcement cards to lawyers, clients, former clients, personal friends, and relatives. *See id.* at 198, 102 S.Ct. 929.

Writing for a unanimous Court, Justice Powell summarized the commercial speech doctrine in the context of advertising for professional services:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently

> misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

Id. at 203, 102 S.Ct. 929. In holding the Missouri restrictions per se invalid as applied to the lawyer, the Supreme Court concluded that the state had no substantial interest in prohibiting a lawyer from identifying the jurisdictions in which he or she was licensed to practice. *See id.* at 205, 102 S.Ct. 929. The Court noted that this "is *factual* and highly relevant information." *Id.* (emphasis supplied). Although the Court found the lawyer's listing in large capital letters that he was a member of the Bar of the Supreme Court of the United States to be "[s]omewhat more troubling" and in "bad taste," this alone could not be prohibited without a finding by the Missouri Supreme Court that "such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court." *Id.* at 205, 102 S.Ct. 929. In short, the Supreme Court in *R.M.J.* was dealing with restrictions on clearly factual and relevant information that had not been found to be misleading or likely to deceive. As in *Bates*, the Supreme Court concluded that such restrictions violated the First Amendment.

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 629, 105 S.Ct. 2265,

85 L.Ed.2d 652 (1985), the Supreme Court addressed whether a state could discipline a lawyer who ran newspaper advertisements containing nondeceptive illustrations and legal advice. One advertisement published the lawyer's willingness to represent women injured from the use of the Dalkon Shield intrauterine device. *See id.* at 630, 105 S.Ct. 2265. The parties had stipulated that the advertisement was entirely accurate. *See id.* at 633-34, 105 S.Ct. 2265.

In holding that the lawyer could not be disciplined on the basis of the content of his advertisement, the Supreme Court observed that the advertisement did not promise results or suggest any special expertise but merely conveyed that the lawyer was representing women in Dalkon Shield litigation and was willing to represent other women with similar claims. *See id.* at 639-40, 105 S.Ct. 2265. Turning to the lawyer's use of an illustration of the Dalkon Shield, the Court first held that illustrations are entitled to the same First Amendment protection as that afforded to verbal commercial speech. *See id.* at 647, 105 S.Ct. 2265. The Court then concluded that "[b]ecause the illustration for which appellant was disciplined is an accurate representation of the Dalkon Shield and has no features that are likely to deceive, mislead, or confuse the reader, the burden is on the State to present a substantial governmental interest justifying the restriction." *Id.* at 647, 105 S.Ct. 2265.

The most recent United States Supreme Court decision to address restrictions on the content of lawyer advertising involved an attorney who held himself out as certified by the National Board of Trial Advocacy (NBTA). *See Peel v. Attorney Registration & Disciplinary Comm'n of Illinois,*

496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990). The state supreme court had concluded that the claim of NBTA certification was "misleading because it tacitly attests to the qualifications of [petitioner] as a civil trial advocate." *Id.* at 98, 110 S.Ct. 2281 (plurality opinion) (quoting *In re Peel*, 126 Ill.2d 397, 128 Ill.Dec. 535, 534 N.E.2d 980, 984 (1989)) (alteration in original). The state court had not addressed "whether NBTA certification constituted *reliable, verifiable evidence of petitioner's experience as a civil trial advocate.*" *Id.* at 99, 128 Ill.Dec. 535, 534 N.E.2d 980 (emphasis supplied). After applauding the development of state and national certification programs, a plurality of the Supreme Court concluded that the facts as to NBTA certification were "true and verifiable." *Id.* at 100, 128 Ill.Dec. 535, 534 N.E.2d 980 (plurality opinion). The plurality pointed out the important "distinction between *statements of opinion or quality and statements of objective facts that may support an inference of quality.*" *Id.* at 101, 128 Ill.Dec. 535, 534 N.E.2d 980 (plurality opinion) (emphasis supplied). A majority of the Court concluded that the letterhead was not actually or inherently misleading, and thus that the attorney could not be prohibited from holding himself out as a civil trial specialist certified by the NBTA. *See id.* at 106, 128 Ill.Dec. 535, 534 N.E.2d 980 (plurality opinion); *id.* at 111-12, 128 Ill.Dec. 535, 534 N.E.2d 980 (Marshall, J., concurring in the judgment).[9]

9. In a dissenting opinion joined by Chief Justice Rehnquist and Justice Scalia, Justice O'Connor concluded that the "[f]ailure to accord States considerable latitude in this area embroils this Court in the micromanagement of the State's inherent authority to police the ethical standards of the profession within its borders." *Id.* at 119, 110 S.Ct. 2281 (O'Connor, J., dissenting).

Appendix A

The pit bull logo and "1-800-PIT-BULL" phone number are in marked contrast to the illustration of the Dalkon Shield intrauterine device at issue in *Zauderer*, which the United States Supreme Court found to be "an accurate representation . . . and ha[ve] no features that are likely to deceive, mislead, or confuse the reader." 471 U.S. at 647, 105 S.Ct. 2265. The Dalkon Shield illustration *informed* the public that the lawyer represented clients in cases involving this device. The "pit bull" commercial produced by the attorneys in this case contains no indication that they specialize in either dog bite cases generally or in litigation arising from attacks by pit bulls specifically. Consequently, the logo and phone number do not convey objectively relevant information about the attorneys' practice. Instead, the image and words "pit bull" are intended to convey an image about the nature of the lawyers' litigation tactics. We conclude that an advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment.

C. Discipline

Because the referee found that the attorneys were not guilty of violating rules 4-7.2(b)(3) and 4-7.2(b)(4), the referee did not address the issue of discipline. The parties do not address the issue of discipline in their briefs to this Court. However, we have in the past approved public reprimands for attorneys who have been found guilty of violating the advertising rules. *See Fla. Bar v. Herrick*, 571 So.2d 1303, 1307 (Fla.1990); *Fla. Bar v. Budish*, 421 So.2d 501, 503 (Fla.1982). We have also required that attorneys

attend the Florida Bar Advertising Workshop. *See, e.g., Fla. Bar v. Zebersky*, 902 So.2d 793 (Fla.2005) (No. SC04-1907) (table report of unpublished order). We conclude that similar discipline is warranted in this case.

CONCLUSION

We disapprove the referee's finding that the television commercial at issue is constitutionally protected speech that does not violate our attorney advertising rules. We find John Robert Pape and Marc Andrew Chandler guilty of violating rules 4-7.2(b)(3) and 4-7.2(b)(4) of the Rules Regulating the Florida Bar. We order that each attorney receive a public reprimand, which shall be administered by the Board of Governors of The Florida Bar upon proper notice to appear. We also direct Pape and Chandler to attend and complete the Florida Bar Advertising Workshop within six months of the date of this opinion.

It is so ordered.

WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

APPENDIX B — AMENDED FINAL ORDER OF REFEREE WILLIAM W. HERRING DATED OCTOBER 6, 2004

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: SC04-40
SC04-41

The Florida Bar Case No.: 2003-90,076(02S)
The Florida Bar Case No.: 2004-90,002(02S)

THE FLORIDA BAR,

Complainant,

vs.

JOHN ROBERT PAPE and MARC ANDREW CHANDLER,

Respondents.

AMENDED FINAL ORDER OF REFEREE WILLIAM W. HERRING

The trial in this action was heard on September 14, 2004. The Court, after reviewing the pleadings, discovery and responses thereto, evidence presented at trial including the television commercial produced by the Respondents, the memoranda of law and supporting documents filed by the respective parties in this action, as well as applicable decisional law, found:

Appendix B

1. The respondents ran television advertisements in which they displayed a logo (a depiction of the head of a pit bull wearing a spiked collar) and the telephone number 1 800-PIT-BULL.

2. The Florida Bar has prosecuted this case alleging that the respondents violated two of The Rules Regulating The Florida Bar: 4-7.2(b)(3) and 4-7.2(b)(4).

3. Rule 4-7.2(b)(3) states "[a] lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications."

4. Neither respondents' logo, nor respondents' 1 800-PIT-BULL telephone number constitute characterizations or descriptions as to the quality of the lawyer services; they describe qualities of the respondent attorneys.

5. There is a big difference (qualitatively and substantively) between quality of services that a lawyer renders and the qualities or characteristics of the advertising lawyer.

6. The second rule that respondents are prosecuted under is Rule 4-7.2(b)(4) which states "[v]isual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative;"

7. The Florida Bar, through its answers to interrogatories, stated that pit bulls are perceived as loyal, persistent, tenacious, and aggressive.

8. The characteristics that The Florida Bar ascribed to pit bulls through their answers to interrogatories are desirable traits in attorneys.

9. The qualities that are depicted by the logo and the telephone number are objectively relevant to the selection of an attorney as they are informational, because these are qualities that a consuming public would want in a trial lawyer; someone who is aggressive, tenacious, loyal, and persistent, and the ad is not improperly manipulative, realizing that all advertising, to be effective, is manipulative at some level. The advertisement is tastefully done, the logo is not unduly conspicuous in its replacement of an ampersand between the respondents' names atop the TV screen, and the large print 1-800 number is an effective mnemonic device tailored to maximize responses from potential clients. That the ad is geared towards a particular market or segment of the public does not deprive it of First Amendment protection. There are no slogans, jingles, alarm bells, or the like, nor does the ad suggest a favorable outcome through the employment of improper means, such as the depiction of a fist. The advertisement herein may be compared with the Dalkon Shield illustration in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 105 S. Ct. 2265 (1985), which was also informational yet potentially offensive to some population segment. An advertisement may be only incompletely informative and still pass constitutional muster, so long as it is not false, misleading, or deceptive,

which this ad is not. The ad is directed to a group which might not otherwise seek representation to vindicate its rights, and the focus must always be on the consumer's right to clean information, not on the attorney's right to attract a clientele.

10. The logo and telephone number are not misleading or deceptive, and The Florida Bar has made *no* record to the contrary, as to surveys or studies of the public. Contrast the Bar's failure herein to make a factual record to demonstrate a concrete, specific, and significant harm as opposed to a speculative, nebulous one to which the present application of the pertinent Rules is purportedly directed (as to the substantial governmental interest being furthered by the Rules' application to respondents, part of the three-pronged test set for in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980), with the showing made by the Bar in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), in support of its prohibition against direct-mail solicitation of victims and their relatives in personal injury and wrongful death cases within 30 days after a loss.

11. That certain segments of the public may find respondents' advertisement to be distasteful or offensive (such as white-collar professionals) is wholly irrelevant to the required analysis, as is the Bar's known animosity towards attorney television advertising.

12. The Rules Regulating the Florida Bar are unconstitutional as applied in this case.

Appendix B

13. The Florida Bar has not selectively enforced the rules against the respondents as alleged by the respondents in their affirmative defenses because the great majority of these ads were in the Florida Bar Journal and the Florida Bar News, which are lawyer-to-lawyer ads and thus the Rules Regulating the Florida Bar are not applicable to them.

14. The great majority of the ads cited by the respondents in their affirmative defense of selective enforcement contain images or statements that are expressly allowed by the rules in terms of ads involving images of marble columns, people sitting in courthouse steps, images of paper and technical drawings and writings. All of these kinds of things are permissible and are approved by the pertinent rules, and again the great majority of them were in lawyer-to-lawyer advertising in the Bar news and Bar journal and are not covered by the Bar rules because they are not media ads in terms of either TV, radio or newspaper or magazine.

Appendix B

IT IS ADJUDGED

1. The respondents' TV advertisements (specifically, the logo (a depiction of the head of a pit bull wearing a spiked collar) and the 1 800-PIT-BULL telephone number) are Constitutionally-protected commercial free speech.

2. The respondents' TV advertisements (specifically, the logo (a depiction of the head of a pit bull wearing a spiked collar) and the 1 800-PIT-BULL telephone number) do not violate the Rules Regulating the Florida Bar.

3. The Florida Bar's attempt to prosecute the respondents under the rules The Florida Bar cites as having been violated by the respondents constitutes an unconstitutional application of those rules to the respondents' rights of commercial free speech as protected under the First Amendment of the Constitution of The United States of America and also the Florida Constitution, Article I, Section 4.

ORDERED at Fort Lauderdale, Broward County. Florida on this 6th day of October, 2004.

County Court Judge/Referee